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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

GEORGE MEYER,

Petitioner,

v.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, VALLEY SANITATION COMPANY, INC., LAND RECLAMATION COMPANY, and WASTE MANAGEMENT OF WISCONSIN, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY

JOANNE F. KLOPPENBURG
Assistant Attorney General
Counsel of Record

JAMES E. DOYLE
Attorney General
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9227
Attorneys for Petitioner

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I. THE PETITION SHOULD BE GRANTED IN ORDER TO RESOLVE THE CONFLICT THE SEVENTH CIRCUIT DECISION CREATES WITH THIS COURT'S COMMERCE CLAUSE JURISPRUDENCE, TO RETURN COMMERCE CLAUSE ANALYSIS TO ITS PROPER CONCERN WITH ECONOMIC PROTECTIONISM AMONG STATES, AND TO RESTORE STATE AUTHORITY TO REGULATE EVENHANDEDLY.

Respondents build from a base of false statements of fact and misstatements of law a house of cards that falls

under the weight of the actual facts before the trial court and this Court's Commerce Clause jurisprudence. What remains unobscured is a decision that invalidates a noneconomic, nonprotectionist, evenhanded state regulation that was proven to have only an incidental, minimally burdensome impact on out-of-state commerce and that was proven to be the most effective and least restrictive means of achieving legitimate health and safety goals. Because the decision upends this Court's Commerce Clause analysis and threatens states' authority to regulate within their traditional purview, this petition should be granted to clarify the Commerce Clause test and its application to evenhanded state regulation.

The United States Court of Appeals for the Seventh Circuit erroneously invalidated Wisconsin's Recycling Law as an extraterritorial regulation, erroneously posited the existence of a nondiscriminatory alternative to revoke the law under the strict scrutiny test, erroneously concluded that the law regulates based on origin rather than content of waste, and erroneously speculated that the law imposes excessive burdens relative to its benefits. It is because the first error is so interwoven in the remaining three errors that the respondents may have misunderstood the petition to seek review only of the decision's first finding. The petition makes clear that all four errors must be corrected by this Court, to restore to states the authority to regulate evenhandedly, authority that the decision has taken away.

A. THE WISCONSIN RECYCLING LAW SURVIVES BOTH STRICT SCRUTINY AND THE BALANCING TEST BECAUSE THERE IS NO NONDISCRIMINATORY, LESS RESTRICTIVE, EQUALLY EFFECTIVE ALTERNATIVE AND THE LAW IMPOSES ONLY MINIMAL BURDENS ON OUT-OF-STATE COMMERCE.

The decision and respondents' brief are striking for the facts they overlook, notably that the district court found no nondiscriminatory alternative to exist to the Recycling Law and only a minimal burden to flow from the law. The Seventh Circuit never properly reviewed those findings of ultimate fact or the evidence on which they were based.[1]

Not all the waste in Rockford may be headed to Wisconsin, but the trial testimony established that a law aimed only at that waste would not be as effective at keeping out recyclable materials. The evidence showed that a law aimed only at the Rockford waste that goes to Wisconsin would not take out as many recyclable materials as the effective recycling program, and would be more intrusive and burdensome for all involved.[2] Pet. App. 47.

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[1]Contrary to the customary practice of this Court in Commerce Clause cases, the court of appeals analyzes the Recycling Law in a factual vacuum. This petition should be granted to prevent courts from considering Commerce Clause challenges based on speculation rather than actual factfinding.

[2]Respondents' assertion that the Law affects "hundreds of thousands of non-Wisconsin residents and businesses with no connection to Wisconsin" (Resp. 12 n.6) is not supported by any evidence in the record. See Pet. App. 45. And of the generators

(continued...)

Respondents did present several alternatives directed only at the waste to be disposed of in Wisconsin, but each and every one was discredited at trial (contrary to their assertion, Resp. 14 n.9), which may explain the absence of factual citations concerning alternatives in their brief.

One additional alternative proposed by respondents and found by the Seventh Circuit within the law itself is a materials recovery facility (MRF) that accepts unseparated waste. This alternative too was discredited at trial. It may be true that a MRF that accepts unseparated waste obviates the need for the waste generator to be subject to an effective recycling program. However, the evidence established that this kind of MRF is actually a nonexistent alternative. Trial Transcript 181, 189, 196. There is no such MRF in Wisconsin. Elsewhere, this kind of MRF has not yet succeeded because it cannot eliminate contamination of the recycled materials at the end of the processing and therefore cannot sell its product. Thus, this kind of MRF is not now a nondiscriminatory alternative to the effective recycling program.

Just as the evidence turned up no nondiscriminatory alternative to the law, so it showed almost no burden from the law. Waste generators, respondent haulers, and communities would benefit economically from the establishment of an effective recycling program. Pet. App. 43-46. There was by contrast

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[2](...continued)
who are affected, there was no evidence of any generator removing more recyclable materials from its waste than are removed in communities with an effective recycling program, respondents' speculation notwithstanding (Resp. 20). If a generator were to come forward and show that its waste contains no recyclable materials, then its waste would be allowed in Wisconsin landfills. Waste that contains no recyclable materials is not subject to the effective recycling program requirements.

no evidence that it would cost generators more either to comply with the program if it was adopted, or to use other disposal facilities if not. Not only was there no evidence that the law precluded out-of-state waste generators from choosing the cheapest disposal service (Resp. 19 n.12), but the evidence that was adduced showed just the opposite. Pet. App. 43-46.[3]

Respondents accurately note that their customers account for most of the out-of-state municipal waste that enters Wisconsin, but miss the significance of the fact that twelve out-of-state communities established effective recycling programs nevertheless--the law's requirements cannot have been too burdensome for those communities despite the relatively insubstantial amount of waste involved. The district court drew a similar conclusion from communications from the communities for which respondents speak, in which those communities made clear to Wisconsin that all that stood between them and an effective recycling program were the two siting and rulemaking provisions the district court knocked down and the State never sought to resurrect. Pet. App. 44-45.

Respondents offer no citations to the appellate decision to support their assertion of a fact-intensive review of the trial record reversing the district court's finding of no excessive burden (Resp. 21), because there was no such review. The citations respondents do make

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[3]Respondents complain that under the Recycling Law out-of-state waste generators were disadvantaged relative to Wisconsin residents because Wisconsin residents could use the landfill of choice while out-of-state waste generators could not use Wisconsin landfills (Resp. 19 n.12). But any such disadvantage occurred because almost all Wisconsin communities adopted an effective recycling program, while some out-of-state communities did not. Had they done so, their residents would have had the same choices as Wisconsin residents.

show that the Seventh Circuit simply fell back on its finding of extraterritorial regulation. Neither respondents nor the Seventh Circuit identify the substantial burden imposed by the Recycling Law, because the record failed to reveal such a substantial burden.

B. THE WISCONSIN RECYCLING LAW SURVIVES BOTH THE NEW EXTRATERRITORIAL IMPACT AND TRADITIONAL STRICT SCRUTINY TESTS BECAUSE IT IS AN EVENHANDED, NON-ECONOMIC, NONPROTECTIONIST LAW THAT HAS ONLY INCIDENTAL IMPACT ON OUT-OF-STATE COMMERCE RESULTING FROM THE DIFFERENT NATURE OF WASTE THAT IS SUBJECT TO THE LAW.

It is only by ignoring the evidence that the square peg of Wisconsin's Recycling Law can be forced into the round hole of economic and protectionist law invalidated by the cases on which respondents and the Seventh Circuit rely. The Commerce Clause bars extraterritorial regulation by economic, protectionist legislation like that in Healy v. The Beer Institute, 491 U.S. 324 (1989), and Brown-Forman Distillers v. N. Y. State, 476 U.S. 573 (1986). The statements respondents quote to support a much broader prohibition (Resp. 9) are artificially segregated from the economic, protectionist regulations to which they apply, regulations not at all like the Recycling Law. The Recycling Law is not aimed at controlling commerce, cf. C & A Carbone, Inc. v. Town of Clarkstown, 114 S. Ct. 1677 (1994), is not a price statute or market regulation that gives local consumers or producers a competitive advantage, cf. Brown-Forman, 476 U.S. 573, Baldwin v. G.A.F. Seelig, 294 U.S. 511 (1935), and New

Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988), and is not a tax case.[4]

All the cases cited by the Seventh Circuit to support its creation of a new, irrebuttable, extraterritorial impact test and its application of the traditional strict scrutiny test[5] involve economic legislation and factual records showing concern with the relative positions of in-state and out-of-state markets. None of those cases supports the application of the new test or the strict scrutiny test to a noneconomic, nonprotectionist, evenhanded regulation like the effective recycling program provision.[6] The diversity of interests reflected by the seventeen state amici, including both waste exporters and waste importers, is a testament to what distinguishes this case from those relied on by respondents and the Seventh Circuit--the effective recycling provision is a pure health and safety regulation of the content of waste, unsullied by any animus toward out-of-state waste and with only a minimal and incidental impact on out-of-state commerce in waste.

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[4]Taxation cases are inapposite inasmuch as the special values applicable to Commerce Clause challenges to state taxes are additional analytical elements not relevant here. Norfolk Southern Corp. v. Oberly, 822 F.2d 388, 399 (3rd Cir. 1987).

[5]Respondents' assertion that the court of appeals "assumed" that an extraterritorial regulation could still be saved if it passed the strict scrutiny test (Resp. 12 n.7) is not supported by the decision.

[6]Indeed, in direct conflict with the decision in this case, the new extraterritorial regulation test was found not to invalidate an evenhanded regulation in Cotto Waxo Co. v. Williams, 46 F.3d 790 (8th Cir. 1995), even though the Minnesota law in that case required Cotto Waxo to set up a whole new sales network in order to bypass Minnesota, thereby significantly affecting commerce that had no relation with Minnesota.

That the provision may have a "practical impact" on out-of-state waste transactions is not disputed, but the Seventh Circuit never searches the record for the nature of that impact.[7] The court assumes the impact must be economically adverse (Pet. App. 18), yet the record discloses otherwise, as noted above. Generators, haulers, and communities will experience little or no increase in cost, and more likely a cost savings. Pet. App. 43-46. Yet, regardless of the incidental and economically benign nature of the impact on out-of-state commerce, the Seventh Circuit forces Wisconsin to accept an inferior alternative and inferior product. Such a result is counter to this Court's precedent.

The Seventh Circuit similarly never searches the record to discern the reason for the impact the Recycling Law may have on out-of-state commerce. That reason is that waste from communities with effective recycling programs is different in nature from waste from communities without such programs. Respondents proffered no evidence that waste from the two kinds of communities is or can be identical in content. Rather, the evidence that was presented established that waste from the latter is more noxious. Pet. App. 46-47.

It is because waste is not like other articles of commerce--its generation is not subject to one producer's control and it cannot be subjected to separate production lines like containers of milk or labels on bottles--that to change its content most effectively, meaning in this case to maximize the absence of recyclable materials, requires a law that affects the generation of waste regardless where

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[7]Notably, respondents assert that a little inconvenience does not constitute a practical extraterritorial effect (Resp. 15). As in Minnesota v. Clover Leaf Creamery, 449 U.S. 456 (1981), so the little inconvenience found by the district court in this case should remove the Recycling Law from the reach of the court of appeals' extraterritorial impact test.

the waste is destined. Where such product differentiation is possible, state regulation of the product has been allowed. Minnesota v. Clover Leaf Creamery, 449 U.S. 456 (1981). That no published case has yet upheld a law like the Recycling Law (Resp. 18) indicates not that the law is unconstitutional, but that never before has a court in a published case addressed an evenhanded, noneconomic, nonprotectionist law regulating an unfungible product.

CONCLUSION

Respondents' assertion that the Commerce Clause is not about economic protectionism (Resp. 18) is proof positive both of the degree to which the Seventh Circuit has strayed from the intent and reach of the Commerce Clause, and of the necessity for this Court to grant this petition in order to preserve states' authority to regulate consistent with the Commerce Clause. As the economy becomes more national, respondents' arguments and the Seventh Circuit's analysis will leave little leeway for evenhanded state regulation. This Court should grant this petition to clarify the distinction between discriminatory and evenhanded state regulation and to reclaim this Court's established Commerce Clause analysis.

Respectfully submitted this 8th day of March, 1996.

JOANNE F. KLOPPENBURG
Assistant Attorney General
Counsel of Record

JAMES E. DOYLE
Attorney General
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9227
Attorneys for Petitioner

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